## UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

TONY B. GASKINS

CIVIL ACTION NO. 05-CV-10858-GAO

Plaintiff,

VS.

UMASS CORRECTIONAL HEALTH SERVICES, ET AL.

Defendants.

## MOTION TO STRIKE PLAINTIFF'S NOTICE OF APPEAL AS UNTIMELY

Defendants Susan Martin, Lisa Mitchell and David Nolan, through counsel, hereby move to strike plaintiff's "Late Notice of Appeal," filed with this Court on October 22, 2007, as untimely. As grounds therefore, the aforesaid defendants state as follows.

- On July 31, 2006, Magistrate Judge Bowler entered a Report and Recommendation in which she recommended that defendants'
   Motion for Summary Judgment be allowed. See docket entry 45.
- On August 15, 2006, plaintiff filed a Motion for Leave to Appeal
   "the Report and Recommendations of U.S.M.J. Bowler on July 31,
   2006." See docket entry 48. This Motion was never acted upon.
- On September 26, 2006, Judge O'Toole entered an "Order
   Adopting Report and Recommendations" and entered judgment in favor of the defendants against plaintiff. See docket entries 51 and 52.
- 4. On October 23, 2006, plaintiff filed a Motion for Leave to Appeal in Forma Pauperis "the Report and Recommendation of U.S.M.J.

- Bowler on July 31, 2006." See docket entry 53 (emphasis added.) With the exception of the handwritten dates, this document is identical to docket number 48, filed on August 15, 2006.
- On November 30, 2006, this Court allowed the plaintiff's Motion for Leave to Appeal in forma pauperis dated October 23, 3006.
   See docket entry dated November 30, 3006.
- 6. Plaintiff has never filed a Motion for Leave to Appeal in Forma

  Pauperis with respect to the judgment entered in favor of

  defendants by Judge O'Toole on September 28, 2006.
- 7. Plaintiff did not file his "Late Notice of Appeal" until October 22, 2007, **more than one year** after judgment entered in favor of defendants. See docket entry 54.
- 8. It is unclear what action by the Court plaintiff's "Late Notice of Appeal" refers to. Regardless of what plaintiff intends to appeal, however, his October 2007 "Late Notice of Appeal" is untimely and should be stricken by this Court.
- 9. Federal Rules of Appellate Procedure 4(a)(1)(A) states that "in a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."

<sup>1</sup> Plaintiff is no stranger to litigation in state and federal court. As set forth in Exhibit 1, he has filed at least 17 lawsuits against Department of Correction officials since 2003.

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- Plaintiff's Notice of Appeal was filed <u>more</u> than 30 days after judgment was entered in favor of defendants on September 28, 2006.
- 11. Prisoners appearing pro se must adhere to the rules of procedure.

  "The right of self-representation is not 'a license not to comply with the relevant rules of procedural and substantive law."

  International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 847

  (1983), quoting Faretta v. California, 422 U.S. 806, 834-835 n.46

  (1975).

Wherefore, defendants Martin, Mitchell and Nolan request that this Court strike plaintiff's Late Notice of Appeal.

Dated: October 31, 2007 Respectfully submitted,

NANCY ANKERS WHITE Special Assistant Attorney General

/s/ Jody A. Brenner

Jody A. Brenner, Counsel BBO No. 633795 Department of Correction Legal Division 70 Franklin Street, Suite 600 Boston, MA 02110-1300 (617) 727-3300 x169

## **CERTIFICATE OF SERVICE**

I hereby certify that on this date a true copy of the above document was served on plaintiff, pro se, via first class mail.

/s/ Jody A. Brenner

Dated: 10/31/2007

Jody A. Brenner, Counsel

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Midd 05-1746	05/24/2005 Gaskins	Tony	Dennehy		đ		Yes MD	SJ	2020			
Norf 03-1288	07/16/2003 Gaskins	Tony			DG		N <sub>o</sub>		1408			
Suff 04-717	03/18/2004 Gaskins	Tony	Dennehy		<b>a</b>		Yes SJD		1101	1105	2017	
Suff 04-883	03/18/2004 Gaskins	Tony			90		OLS ON		1408			
Suff 05-257	02/07/2005 Gaskins	Tony	Dennehy		D.R.		Yes SJ		2016	1106		
USDC 05-10630	05/11/2005 Gaskins	Tony	Nolan		W52145 DR		No INAC		1004			
USDC 05-10858	06/13/2005 Gaskins	Tony	UMMS		W52145 JAB		Yes SJ	-	2501			
USDC 05-11230	08/02/2005 Gaskins	Tony	≡ Ha⊒	Timothy	W52145 DR	3	No INAC		1004	1002		
Suff 06-50	04/13/2005 Gaskins	Tony	Marshall		×		Yes					•
Suff 06-2984	07/28/2006 Gaskins	Tony	Dennehy		\$		Yes					
Suff 06-3344	09/12/2006 Gaskins	Tony			OC.		Yes MD		1107	1108	2803	
Suff 06-3343	09/20/2006 Gaskins	Tony	Marshall		MM		Yes DISC	Ь	1705	1106		
Suff 06-3875	09/21/2006 Gaskins	Tony			W52145 SG		Yes MD		1106	1705	1006	
Suff 06-4074	10/11/2006 Gaskins	Tony			MM		Yes NEW	DISC				
Suff 06-4334	10/24/2006 Gaskins	Tony			MM		Yes DISC	DISC				
Suff 07-339	02/05/2007 Gaskins	Tony	Marshall		CWA		Yes					
Suff 07-1095	03/26/2007. Gaskins	Tony			ਉ		Yes					
Suff 07-2005	05/24/2007 Gaskins	Tony			MM		Yes					
Suff 07-2267	06/29/2007 Gaskins	Tony	St. Amand		W52145 SG		Yes NEW		2017			
USDC 07-10507	07/10/2007 Gaskins	Tony			W52145 DR		Yes DISC		1004			
Suff 06-3335	07/31/2007 Gaskins	Tony	Dennehy	Kathleen	Д		Yes					